

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

ANNE MARIE LEVESQUE

Complainant:

v.

STRAFFORD COUNTY, RIVERSIDE REST:
HOME

Respondent:

CASE NO. M-0536
DECISION NO. 80037

ORDER DENYING PETITION FOR REHEARING

On September 25, 1980, the Board entered a decision, No. 80037, wherein they found no unfair labor practice against the Riverside Rest Home, Strafford County, in the dismissal of the Complainant, Anne Marie Levesque, and dismissed the charges.

The Board at its hearing, October 30, 1980, unanimously denied the rehearing request filed by Attorney Paul McEachern on behalf of the complainant as said petition did not purport to present any new evidence in the case.


EDWARD J. HASELTINE, Chairman

Signed this 30th day of October, 1980.

By unanimous vote. Chairman Haseltine presiding, members Hilliard, Osman and Mayhew present and voting. Also present, Executive Director LeBrun

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ANNE MARIE LEVESQUE

V.

CASE NO. M-0536
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STRAFFORD COUNTY RIVERSIDE REST
HOME

APPEARANCES

Representing the Complainant, Anne Marie Levesque:

Paul McEachern, Esquire, Counsel
Anne Marie Levesque
Teresa Sevinsky
Jean Doherty

Representing Strafford County Riverside Rest Home:

Dennis May Esquire, Counsel
Terry Casey, Administrative Aide
Lynn Stewart
Barbara Reed

BACKGROUND

This is a complaint brought by Anne Marie Levesque, a young nurse's aide working at the Strafford County Riverside Rest home, employed there since May, 1979. The Strafford County Rest Home has been the site and subject of intense labor activity for some time. On or about May 2, 1980, Anne Marie Levesque was given a warning and termination notice based on her conduct and was terminated on May 15, 1980. Throughout her employment, Anne Marie Levesque was active in union activities, speaking about the union, attending meetings, wearing union pins, running for union office and otherwise participating in efforts to organize the employees of the Rest Home. At the time of her termination, there was no union contract in effect and no negotiated grievance procedure in effect concerning terminations. After discharge, Anne Marie Levesque appealed her discharge to her supervisor who denied the appeal. No further appeal was taken by her to the Strafford County Commissioners. Following that appeal, she filed an Unfair Labor Practice complaint with the Public Employee Labor Relations Board dated June 16, 1980 charging that the employer had violated the provisions of RSA 273-A:5 I (a) (b) (c) in that it was alleged the employee was terminated for participating in union activities. The complaint requested that all warnings be removed from the file of the employee and that she be reinstated immediately with all back pay.

The Riverside Rest Home administration responded to the charge by denying that termination was based upon union activities and further detailed the incidents which resulted in her termination, according to management.

A hearing was held before the Public Employee Labor Relations Board at its offices in Concord, New Hampshire on July 31, 1980.

FINDINGS OF FACT AND RULINGS OF LAW

Basic to the role of the Public Employee Labor Relations Board in this case is the fact that there was no collective bargaining agreement containing a negotiated grievance procedure in effect at the time of the termination. Therefore, the Board cannot and will not consider the basic propriety of the termination or seek to second-guess the judgment of the employer in terminating the employee. Under these circumstances, that is outside of the jurisdiction of this Board.

"RSA 273-A:5I does not prohibit any acts by a public employer that may be considered unfair. Instead, it proscribes certain acts in derogation of the collective bargaining process. Short of that, the PELRB has no other source of remedial power and the decision whether or not to discharge an employee is a matter of managerial policy.

See RSA 273-A:1 "XI."

Roger A. Bouchard v. City of Rochester et al,
119 N.H. (Nov. 14, 1979).

Therefore, the only basis for the review by this Board is the charge that termination was a result of union activity. This Board has held that such a finding can be demonstrated by circumstantial evidence and need not have evidence of a "smoking gun" in order to succeed. Barrington Education Association, NHEA/NEA v. Barrington School Board, PELRB case number T-0298:2, PELRB decisions numbered 80002 and 79018. However, in order to find such activity, there must be a connection between and demonstration of union activity as a basis for the decision of the employer.

A review of the facts presented at hearing in this case indicates that Anne Marie Levesque was considered to be a generally capable, enthusiastic, cooperative employee capable of doing her job. The evidence also indicated that she was active in union activities as stated in the "background" section above. Evidence produced at the hearing showed that there were many other employees active in union support at the Strafford County Nursing Home, wearing pins, speaking on behalf of the union which represented the employees

or other organizations seeking to represent the employees, running for union office and in other ways participating in the organizational activities. Anne Marie Levesque was not unique in that regard. The evidence further indicated that supervisors and managers of the employer were aware of the interest in and activities concerning collective bargaining evidence by Anne Marie Levesque. They were also aware of the activities of other employees.

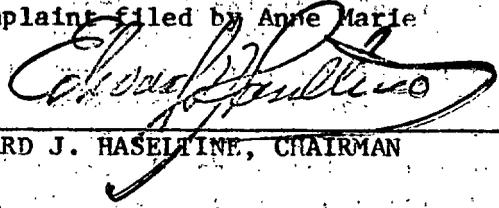
There was no direct evidence at the hearing that Anne Marie Levesque was dismissed because of her union activities. The Board has been asked to infer from the evidence that this was the reason for her dismissal. Countering that request for inference by the Board is the direct testimony of several witnesses concerning the specific reasons for the dismissal of Anne Marie Levesque. These witnesses and the evidence provided by them showed that although the evaluations of Anne Marie Levesque were generally favorable, she did on three specific occasions receive warnings in writing and on other occasions received verbal warnings. The thrust of these warnings was to the effect that she was disregarding rules and instructions of superiors, taking action inconsistent with her job in the view of her supervisors and, in general, demonstrating a disregard for the rules and regulations of her working environment. After the third warning, for verbally taunting a co-worker and, in the opinion of management, causing the co-worker anguish and embarrassment, she was told that she would be terminated on or about May 15, 1980. Testimony indicated the policy of the Rest Home is to consider termination after three written warnings.

As stated above, this Board will not evaluate whether the reasons for firing were sufficient and will not substitute its judgment for the judgment of management as to the sufficiency of reasons for terminating employment. The only basis on which this Board can act is a finding that termination resulted from union activity. The Board is unable to so find in this case since there was no direct evidence and insufficient evidence when taken as a whole to support an inference that the termination of Anne Marie Levesque was for union activity. In short, having considered all of the facts and evidence, the Board finds that the complaint has not been supported. The Board therefore issues the following order.

ORDER

I. Having found that the charges were not supported by evidence at hearing sufficient to warrant an unfair labor practice finding, the relief requested is denied.

II. The unfair labor practice complaint filed by Anne Marie Levesque is dismissed.



EDWARD J. HASELTINE, CHAIRMAN

Signed this 25th day of September, 1980.

Chairman Haseltine presiding. Members Mayhew, Osman and Hilliard present and voting. Also present, Executive Director, Evelyn C. LeBrun. Members Mayhew and Osman concur in this decision.

Member Russell F. Hilliard, dissenting.

I must respectfully dissent from the conclusion reached by the majority, and to find that the discharge of Anne Marie Levesque from her employment at the Riverside Nursing home was motivated, at least in part, by her union activities, thus violating RSA 273-A:5 (a) (c).

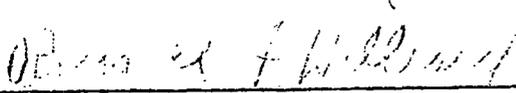
It has been said, "there is no window to the human mind"; much less is there one to a governmental "mind". Since anti-union, and thus illegal, activity would rarely, if ever, be admitted by any government official, the discharged employee cannot be expected to meet such a heavy burden of proof. The trier of fact must rely on circumstantial evidence and inferences therefrom to make its finding.

Three significant elements appeared in the evidence presented at hearing. First, Anne Marie Levesque engaged, in a spirited manner, in many union activities. Second, technically at least, Anne Marie Levesque had received sufficient warnings within one year to justify dismissal. Third, undisputed testimony from a fellow employee and admissions by a supervisor confirmed that union activities were cited by the supervisor as part of the basis of the dismissal of Anne Marie Levesque.

Weighing these circumstances, it can only be concluded that a discharge cannot be partially illegal and partially not. Any consideration of union activities in the dismissal must be viewed by this board as a violation of our statute. The existence of alternate, independent grounds will not avoid the ambit of the law; they are merely a pretext. In any event, I would find on the basis of the egregiousness of the violations resulting in the three warnings that they could not conceivably have even been the primary reason for the discharge. Left in this posture, only one conclusion remains.

This case presents a stark example of the need for a workable grievance procedure to test the just cause for a dismissal from public employment. Without this procedure, any such employee is left with the burden of proving an unfair labor practice. All public employee unions should recognize their important role in this regard.

I would find an unfair labor practice, and order reinstatement, back wages, and expungement of the dismissal from the employment record.



RUSSELL F. HILLIARD, Esquire
Board Member

Signed this 25th day of September, 1980.